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In the Supreme Court of the United States

OCTOBER TERM, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the criminal penalty provision of the Lacey Act, 16 U.S.C. 3373(d)(1)(B), the price paid for guiding or outfitting services for unlawful hunting expeditions may be considered in determining whether a violation of the Act involved goods having a market value in excess of $350.

2. Whether the district court's jury instruction that defined "market value" for the purpose of applying the penalty provision of the Lacey Act was vague and ambiguous.

3. Whether petitioner's sentence was properly enhanced under Sentencing Guidelines § 2Q2.1(b)(3)(A).

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A19) is reported at 966 F.2d 1270. The judgment of the district court (Pet. App. G1-G13) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F1-F2) was entered on July 22, 1992. A petition for rehearing was denied on September 10, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on December 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted on 21 counts of violating the Lacey Act and conspiring to do so based on his role in organizing and guiding several illegal deer hunting expeditions. See 16 U.S.C. 3372(a)(2)(A), 3372(c)(1), 3373(d)(1)(B); 18 U.S.C. 371. He was sentenced to 37 months in prison, to be followed by three years' supervised release, and he was ordered to pay $21,000 in restitution. Pet. App. G4-G10. The court of appeals affirmed.

1. The Lacey Act makes it unlawful to sell or transport in interstate commerce wildlife taken in violation of state law. 16 U.S.C. 3372(a)(2)(A). A person "sell[s]" wildlife in violation of the Act whenever, for money or other consideration, he offers or provides "guiding, outfitting, or other services" or a "hunting or fishing license or permit" for the illegal taking of wildlife. 16 U.S.C. 3372(c)(1).[1] A violation of the unlawful sale of wildlife provision under the Act is punishable by not more than five years' imprisonment, a fine of not more than $20,000, or both, provided it involves the "sale or

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[1] In 1988, Congress amended the Lacey Act to overturn the decision in *United States* v. *Stenberg*, 803 F.2d 422, 437 (9th Cir. 1986), which held that the Act's prohibition against the "sale of wildlife" did not apply to the sale of guiding services or hunting permits. Lacey Act Amendments of 1988, Pub. L. No. 100-653, § 101(3), 102 Stat. 3825; see S. Rep. No. 563, 100th Cong., 2d Sess. 5 (1988) (amendment "defines the term 'sale' as it is used in the Lacey Act to include, as set forth in the Committee's report on the 1981 Act, the providing of guiding services used in the illegal taking of wildlife"); see also S. Rep. No. 123, 97th Cong., 1st Sess. 12 (1981) ("a commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is, in effect, an offer to sell wildlife").

purchase" of wildlife with a market value exceeding $350. 16 U.S.C. 3373(d)(1)(B).

Petitioner owned and operated a Jacksonville, Florida, business that organized and outfitted deer hunting expeditions in the State of Montana. Pet. App. A6. Petitioner charged a base outfitting fee of at least $1,500 per hunter.[2] In return, he provided meals, lodging, and guide services, and he promised to supply each hunter with a valid Montana state hunting license. Petitioner agreed to split his outfitting fees with two others who provided meals and lodging for the hunters at their Montana ranch and assisted petitioner in guiding the hunts. *Ibid.*

During November 1989, petitioner arranged for three separate hunting expeditions. Knowing that it was a violation of Montana law to hunt deer without a valid license, petitioner nonetheless proceeded to provide guide services for unlicensed hunters. Pet. App. A6-A8. He also agreed to guide some of the hunters on illegal nighttime hunts. In addition, petitioner instructed the hunters to tag their killed deer in violation of Montana law. At the end of each hunt, petitioner either arranged to ship the deer to the hunters' homes outside of Montana or assisted the hunters in arranging for the shipments. *Ibid.*

The Montana Department of Fish, Wildlife, and Parks became aware of petitioner's activities and arranged for two undercover officers to book a guided deer hunt with petitioner's agency. Pet. App. A8. Although each officer paid the standard $1,500 outfitting fee, neither received a valid Montana state hunting license. During the hunt, two deer were killed, and one officer paid petitioner an

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[2] Petitioner also charged $200 for a Montana state hunting license and an additional fee if the hunter killed a second deer. Petitioner's fees generally ranged from $1,500 to $3,000 per hunter. Pet. App. A6-A8.

additional fee of $100 to ship his deer to South Carolina. *Ibid.* Petitioner was subsequently arrested by Montana state game wardens.

2. At sentencing, the probation officer recommended a sentence of 30 to 37 months' imprisonment under the Sentencing Guidelines for the 21 counts of conviction. The recommendation was based in part on a four-level increase for the market value of the illegally taken wildlife under Sentencing Guidelines § 2Q2.1(b)(3)(A). Petitioner challenged the probation officer's calculation of the offense level on several grounds, but the district court rejected petitioner's objections to the presentence report and sentenced him to 37 months' imprisonment. Pet. App. G4-G9.

3. On appeal, petitioner challenged his felony conviction by arguing, *inter alia*, that the government had failed to present sufficient evidence that the wildlife alleged in each count had a market value in excess of $350 under 16 U.S.C. 3373(d)(1)(B), and that the district court had erred in allowing the jury to consider the price of his guide services in determining the market value of the deer.[3] Petitioner also challenged his sentence, arguing for the first time on appeal that Sentencing Guidelines § 2Q2.1(b)(3)(A) could not be used to enhance a sentence for Lacey Act violations, because deer are not "specially protected" wildlife within the meaning of that Guideline.

The court of appeals affirmed petitioner's convictions and sentence. Pet. App. A1-A19. Specifically, the court held that, because an offer to provide guide services is an offer to sell wildlife under the Act, the district court did not err in allowing the jury to consider the amount a

[3] The district court had instructed the jury that it could determine the market value of the deer sold by petitioner either by the price each deer would bring if sold on the open market or by the "price paid for guiding services for the hunt in which the wildlife was taken." Pet. App. A9.

hunter paid for petitioner's guide services in determining the market value of the wildlife under the penalty provision. *Id.* at A9-A11. The court also concluded that a four-level increase was warranted under the version of Sentencing Guidelines § 2Q2.1 that was in effect when petitioner committed his crimes and when he was sentenced. After reviewing the history of the Guideline,[4] the court concluded that it applied to wildlife taken in violation of the Lacey Act. Pet. App. A16-A19.

ARGUMENT

1. Petitioner's principal contention (Pet. 9-32) is that the district court erroneously allowed the jury to consider the money paid for petitioner's guiding or outfitting services in determining "market value" under the criminal penalty provision of the Lacey Act, 16 U.S.C. 3373(d)(1)(B). Petitioner does not dispute (Pet. 14-17) that the sale of guiding and outfitting services is deemed a sale of wildlife under the Lacey Act. See 16 U.S.C. 3372(c)(1)(A). He argues, however, that because Congress enacted no "corresponding amendments to the penalty provisions" in 16 U.S.C. 3373, it must not have intended the price of such services to be used in calculating "market value" under the criminal penalty provision of the Lacey Act.

The criminal penalty provision of the Lacey Act states, in relevant part, that:

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[4] The court of appeals noted that, prior to November 1, 1989, the Sentencing Guidelines contained two separate provisions dealing with unlawful offenses involving wildlife. Pet. App. A17. Section 2Q2.1 applied to violations of statutes such as the Endangered Species Act, which provide special protection to particular species of wildlife. Section 2Q2.2 applied to violations of the Lacey Act. Effective November 1, 1989, Section 2Q2.2 was deleted and consolidated with Section 2Q2.1. See Sentencing Guidelines App. C, Amend. 209 (Nov. 1, 1990); Pet. App. A17.

> Any person who * * * violates any provision of this chapter * * * by knowingly engaging in conduct that involves the sale or purchase of * * * wildlife * * * with a market value in excess of $350, * * * shall be fined not more than $20,000, or imprisoned for not more than five years, or both.

16 U.S.C. 3373(d)(1)(B). Congress has made clear that the sale of guiding and outfitting services for the illegal taking of wildlife is equivalent to the "sale or purchase of * * * wildlife" forbidden under the Act. See 16 U.S.C. 3372(c) and note 1, *supra*. See also Pet. App. A10, citing *Stenberg*, 803 F.2d at 436.[5] The penalty provision refers to the "sale or purchase of * * * wildlife * * * with a market value" above a fixed amount. When hunting or outfitting services are sold, it is a transaction (the sale or purchase) involving wildlife that is the basis of the offense. In that context, the phrase "market value" is properly construed as referring to "the sale or purchase" of wildlife—*i.e.*, the transaction that is the basis of the violation of the Act—rather than to the value of the wildlife itself. To be sure, in cases in which the violation of the Act is based on a direct sale of wildlife (rather than on the provision of services), the market value of the "sale or purchase" will be the same as the market value of the wildlife sold. When the "sale or purchase" at issue involves the provision of illegal wildlife services, however, the market value of such "sale

[5] The court of appeals also correctly noted that its decision in *Stenberg* provides no support for petitioner's argument (Pet. 13-14) that the market value of wildlife under the Act can be determined only by the aggregate value of the wild animal's parts on the open market. Pet. App. A10-A11. Since the court's conclusion in *Stenberg*—that an offer to provide guide services was not a "sale" under the Act—is no longer the law, that case "offers little guidance on the proper method for determining the market value of an animal taken during a guided hunt." Pet. App. A10-A11..

or purchase" involves the "amount a hunter is willing to pay for the opportunity to participate in the hunt." Pet. App. A10. See *United States* v. *Todd*, 735 F.2d 146, 152 (5th Cir. 1984) ("The best indication of the value of the game 'sold' in this manner is the price of the hunt."), cert. denied, 469 U.S. 1189 (1985). The fact that Congress failed to amend 16 U.S.C. 3373 to make explicit that the "market value" of wildlife could be determined by the price paid for guiding services is of no significance, since such an amendment would have been superfluous.[6]

2. Petitioner also argues (Pet. 17-32) that the jury instruction regarding the methods for determining the market value of wildlife was vague and ambiguous.

The district court instructed the jury as follows:

> The market value of wildlife may be established by several methods. One method is, of course, the price a piece of property would bring if sold on the open market between a willing buyer and seller. Another method to establish market value is the price paid for guiding services for the hunt in which the wildlife was taken. Either of the above methods is a proper method to use in determining market value.

Jury Instruction No. 50. Petitioner objects that the instruction was inadequate because, with respect to the valuation of the guiding services, it failed to specify whether "guiding services" referred to the total fee paid

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[6] Petitioner's suggestion (Pet. 17) that the rule of lenity supports his argument is without merit. The rule of lenity is a rule of statutory construction employed only to resolve a "grievous ambiguity or uncertainty" in a statute. *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974); see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 29 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 342-343 (1981). There is nothing ambiguous about the criminal penalty provision of the Lacey Act.

by the hunters, including meals, lodging, and ground transportation.

By directing the jury's attention to the price asked and paid for "guiding services for the hunt in which the wildlife was taken," the instruction used the language of the statute. In fact, the statute included within the definition of wildlife not only "guiding * * * services," but "outfitting, or other services" as well. 16 U.S.C. 3372(c)(1)(A). Thus, the statute was more inclusive than the instruction and would have authorized the inclusion of the fee for lodging, meals, and transportation as "other services" related to the hunting expedition. By limiting the chargeable services to "guiding * * * services," the instruction gave petitioner the opportunity to argue to the jury that neither the value of the deer nor the value of the guiding services themselves exceeded $350 for each count charged in the indictment. Nonetheless, the jury heard testimony concerning the amount that was paid for the services, and in light of the high price petitioner charged each hunter for the hunting expedition, it was reasonable for the jury to conclude that the guiding services, no matter how narrowly defined, had a market value in excess of $350.[7]

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[7] Petitioner's reliance on *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985), see Pet. 22-25, is unavailing. That case stands for the unremarkable proposition that a district court must instruct the jury on all the essential elements of the offense. The court did that in this case. Although petitioner would have preferred a more comprehensive instruction, the one given by the court was sufficiently clear to enable counsel to argue petitioner's points to the jury intelligently and to give the jury the proper legal framework for its factual findings. The decision in *United States* v. *Wentz*, 800 F.2d 1325 (4th Cir. 1986), is also unhelpful to petitioner. In that case, the defendant was convicted under a statute that made it unlawful to transport stolen property having a "value" of at least $5,000. See 800 F.2d at 1326, 1327. The jury was instructed that "value" meant either market value, which was

3. Petitioner contends (Pet. 32-49) that Sentencing Guidelines § 2Q2.1(b)(3)(A) cannot be applied to enhance his sentence, and that the court of appeals' reliance on a post-offense amendment to that Guideline violates the Ex Post Facto Clause. Contrary to petitioner's contention, there is no *ex post facto* problem in this case. As an initial matter, the sentencing court did not apply a version of the Guidelines that post-dated his offenses. The district court applied the 1989 version of Section 2Q2.1, which was in effect when petitioner committed his crimes and was still in effect when he was sentenced. Pet. App. A17-A18 & n.7. Thus, petitioner's case does not involve the retroactive application of a Guideline, and presents no constitutional issue. See *Miller* v. *Florida*, 482 U.S. 423, 430 (1987).

Instead, as petitioner acknowledges (Pet. 7), this case simply presents the question of whether the lower courts correctly interpreted the 1989 version of Guideline § 2Q2.1(b)(3)(A) to cover petitioner's Lacey Act offenses. Petitioner contends that the 1989 version of that Guideline cannot be used to enhance his sentence because deer are not "specially protected" wildlife within the meaning of the Guideline. As the court of appeals correctly held, however, there is "no distinction between

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defined as the price a willing buyer would pay to a willing seller, or "replacement value less the amount of depreciation that occured during the time that the property was in the possession of its owner." The court stated that "[t]he second measure of value, replacement value less depreciation, would best have been left unsaid" because its meaning was unclear. In the instant case, the jury was instructed that it had to determine "market value," as the Act's penalty provision explicitly required, and that the value could be estimated by considering the price paid for guiding services. That definition did not have the vice of lack of clarity that infected the "replacement value less depreciation" formula in *Wentz*.

specially protected wildlife and wildlife taken in violation of the Lacey Act" under the consolidated 1989 version of Guidelines § 2Q2.1(b)(3)(A); Pet. App. A18. When the Sentencing Guidelines were amended as of November 1, 1989, Section 2Q2.2, which had applied to violations of the Lacey Act, was deleted. The sentencing provision for the Lacey Act was then consolidated with Section 2Q2.1, which had applied to other wildlife protection statutes such as the Endangered Species Act. See Sentencing Guidelines App. C, Amend. 209, Commentary (Nov. 1, 1990) ("The purpose of this amendment is to consolidate two guidelines that cover very similar offenses."); see also note 4, *supra*. While the consolidated version of Section 2Q2.1 retained the reference to "specially protected" wildlife, the commentary made clear that the Sentencing Commission intended that provision to apply to violations of several different wildlife protection statutes, including the Lacey Act. See Sentencing Guidelines § 2Q2.1, Commentary (Nov. 1, 1990) (expressly stating that "[t]his section applies to violations of * * * the Lacey Act").

Petitioner relies on a post-sentence amendment to Section 2Q2.1, which deleted the reference to "specially protected" wildlife that, as the Sentencing Commission explained, had been "inadvertently retained when this guideline was consolidated with the former § 2Q2.2." Pet. App. A17-A18, quoting Sentencing Guidelines App. C, Amend. 407 (commentary) (Nov. 1, 1991). Petitioner ignores the fact that the commentary to the 1989 consolidated version of the Guideline stated that the 1989 version applied to violations of the Lacey Act. The subsequent deletion of the words "specially protected" in 1991 thus did not effect a substantive change in the reach of Section 2Q2.1, but rather constituted simply a clarification of the language of the 1989 version, which was intended to have no substantive effect. For that reason,

petitioner's sentence was properly imposed under the Sentencing Guidelines, and there is no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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